88-869

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

QUINCE L. EVANS
SEAMAN APPRENTICE
UNITED STATES NAVY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether it is a violation of the Confrontation Clause of the Sixth Amendment to deny a defense motion for a mistrial after the jury members have heard inadmissible hearsay evidence of an out-of-court identification of petitioner and seen the photograph of petitioner used to obtain that identification, when the defense counsel elicited the hearsay evidence on cross-examination in reliance on the prosecutor's assurance to the judge that the person who made the identification would testify as a government witness, when that person in fact did not testify, and when the military judge retrieved the inadmissible photograph from the members and gave a limiting instruction to the jury?

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

QUINCE L. EVANS
SEAMAN APPRENTICE
UNITED STATES NAVY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

The petitioner, Quince L. Evans, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Evans,* 27 M.J. 34, (C.M.A.1988), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, rendered October 3, 1987, is not reported. *United States v. Evans,* No. 84 2764 (N.M.C.M.R. 3 October 1987) (unpublished). It is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on July 17, 1985. The decision of that court was rendered on September 28, 1988, affirming petitioner's conviction of March 1st, 1984, as affirmed by the United States Navy-Marine Corps Court of Military Review on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States in pertinent part provides:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> Section 1: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was tried by general court-martial composed of officer members on 22, 23, 24, and 28 February and 1 March 1984 for violating Articles 85, 121, 122, 123, and 134, Uniform Code of Military Justice.[1] Contrary to his pleas, petitioner was found guilty of one specification of unauthorized absence, one specification of larceny, five specifications of assault, one specification of communicating a threat, two specifications of robbery and two specifications of altering and uttering a check. Petitioner claims no error with respect to the charges of unauthorized absence or altering and uttering a check. Petitioner was sentenced to be confined at hard labor for 30 months, to forfeit $450.00 pay per month for 30 months, to be reduced to pay grade E-1, and to be discharged from the Naval Service with a dishonorable discharge. The officer who convened petitioner's court-martial approved the sentence as adjudged.

The larceny, assault, communicating a threat and robbery charges stemmed from an armed robbery that oc-

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[1] 10 U.S.C. §§ 881, 918, 921 and 923 (1982).

curred at Naval Regional Medical Center in Oakland, California. The Government alleged that petitioner and one John C. Hill, Jr., both wearing masks, entered the naval hospital, and robbed narcotics. John Hill, a cocaine addict, pled guilty prior to petitioner's trial and was the main witness against petitioner.

During his investigation of the robbery, John Schmitz, a Special Agent with the Federal Bureau of Investigation, had interviewed Karen Cobb. Ms. Cobb allegedly saw someone throw a black camera case into bushes near her apartment. Special Agent Schmitz recovered the bag from the spot where Ms. Cobb said it had been thrown. The bag contained the fruits of the robbery: valium, cocaine and morphine. After recovering the bag, Special Agent Schmitz showed Ms. Cobb petitioner's driver's license and asked her if the person pictured on the license was the person who had thrown the camera case into bushes. Ms. Cobb looked at the photograph on the license and told Agent Schmitz that the person pictured on the license (petitioner) was the one who threw the black camera case in the bushes.

During opening remarks the Government ended the summation of the evidence it intended to produce as follows:

> . . . you will also hear testimony that an individual by the name of Karen Cobb identified SA Evans as being at her brother's apartment . . . (and that she saw him) place a black bag with a long strap in some bushes and that the next day when the FBI contacted her she took them to the spot where the FBI Agent, John Schmitz, who will be here to testify, found a Bell and Howell black camera case with a long black strap and in it the valium, the cocaine, and the morphine taken from the hospital.

John C. Hill Jr. testified that he and petitioner went into the naval hospital at the Naval Regional Medical Center in Oakland, California for the purpose of stealing narcotics. Hill carried a knife. According to Hill, petitioner and Hill put on scrub gowns and wrapped shirts around their heads to disguise themselves. They assembled three enlisted personnel, a nurse and an anesthesiologist at knife point and held them in the dictaphone room. They forced the anesthesiologist to give up his keys to the narcotics locker. According to Hill, he and petitioner then took cocaine, morphine and valium from the narcotics locker, put them in a paper bag, tied up the nurse and anesthesiologist, and fled. Hill claimed that petitioner told the nurse that she had better watch out because he knew her home address. Hill said he had robbed the hospital because he was strung out on drugs and needed cocaine.

Later, during its case-in-chief, the Government called Agent Schmitz. To prevent Agent Schmitz from testifying concerning Ms. Cobb's out-of-court identification of petitioner the defense counsel objected that such identification was unreliable.[2] The defense maintained that Ms. Cobb's identification should not have been admitted into evidence because Agent Schmitz' comments to Ms. Cobb amounted

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[2] The objection was made under Mil. R. Evid. 321(d)(2) which states:

> *Unreliable identification.* When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

to an undue suggestion that it was the petitioner who had thrown the camera case in the bushes.[3] The prosecutor disagreed and assured the military judge that Ms. Cobb would be called by the Government as a witness on the merits.

The military judge ruled that Agent Schmitz' showing of the photograph to Ms. Cobb was not unnecessarily suggestive and informed the defense counsel that he was at liberty to cross-examine both Agent Schmitz and Ms. Cobb concerning the weight and validity of Ms. Cobb's identification.

On direct examination the prosecutor had Agent Schmitz identify the driver's license that Schmitz had shown to Ms. Cobb. The license was introduced into evidence and shown to the jury. The prosecutor then asked Agent Schmitz why he had shown petitioner's driver's license to Ms. Cobb and he replied that it was "to determine if she could identify this individual as being the individual that she observed putting the item that she said she saw into the bushes." Agent Schmitz stopped short, however, of making the crucial statement that Ms. Cobb had identified petitioner's photograph. Defense counsel's cross-examination of Agent Schmitz proceeded, in part, as follows:

> Q. And you showed her the picture of the accused and asked her if this was the person who was there, isn't that right?
>
> A. Yes.
>
> Q. And after you showed her the picture she said, "Yes, it is," isn't that correct?
>
> A. Yes.

---

[3] When FBI Agent Schmitz showed the photograph on petitioner's drivers license to Ms. Cobb he asked: "Is this the guy who did it?"

Q. She did not volunteer his name, isn't that right?
A. No.

Subsequent to defense counsel's cross-examination, the members posed two questions to the Agent Schmitz.[4] The first concerned fingerprints and the second concerned the age of the driver's license.[5] After Agent Schmitz answered the questions, the military judge excused him from the courtroom and the following colloquy took place between the military judge and the prosecutor:

MJ: Well, will Karen Cobb be a witness in his case?
TC: She's not here yet but is expected to be here this afternoon.
MJ: I expect, based on this testimony, that she was intended to be a witness, is that right?
TC: Yes, sir.

Karen Cobb was never called by the prosecutor and did not testify. When the Government had rested its case, the defense moved for a mistrial based on Agent Schmitz' inadmissible hearsay testimony that Ms. Cobb had identified the petitioner as the person who had thrown the

---

[4] In accordance with Mil. R. Evid. § 614 (b) members of military juries are permitted to question witnesses.

[5] The questions and answers were:

Q. Are you aware whether any of the evidence that you have testified about was checked for fingerprints—latent prints?
A. I'm not sure whether NIS did that or not. I turned it over to them right after I received it; and
TC: What's the question?
MJ: The date of the issuance of the driver's license?
TC: Yes, sir: it's on there. I believe it's 1 June, 1979. I will show it to defense counsel.

camera case into the bushes. The defense counsel stated his grounds for the motion as follows:

> ICC: . . . Upon questioning by the military judge, the trial counsel told the military judge that Karen Cobb would be called also. We had moved at that time to suppress the out of court identification as unnecessarily (sic) suggested—and it was denied by the military judge—*that was denied by the military judge after representation by the trial counsel that Ms. Cobb would be called.*
>
> MJ: So what do you want?
>
> ICC: I want a mistrial.

The military judge denied the motion.

In an attempt to cleanse all traces of the inadmissible evidence from the minds of the jury, the military judge retrieved the driver's license and, the following day, instructed the members to disregard Agent Schmitz' testimony.

Petitioner testified and denied committing the robbery. Petitioner admitted knowing John Hill and going to see him at the hospital about a debt the day of the robbery. He explained that he had lent Hill and a friend money a long time prior to the robbery, and had telephoned Hill to remind him of the debt. Hill had, in petitioner's opinion, become quite annoyed with petitioner's calling. Hill's friend, who worked at the hospital and knew his way around the building, had also been at the hospital that day. According to petitioner, Hill had told petitioner shortly after the robbery that Hill had to implicate someone in order to get a pretrial agreement on the robbery charges. Petitioner had been an unauthorized absentee when Hill first implicated him.

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO ENSURE MILITARY AND CIVILIAN COURTS COMPLY WITH THE REQUIREMENTS OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IN THAT A MISTRIAL SHOULD BE ORDERED BY THE TRIAL JUDGE AFTER THE JURY MEMBERS HEAR INADMISSIBLE HEARSAY EVIDENCE OF AN OUT-OF-COURT IDENTIFICATION OF AN ACCUSED.

The Confrontation Clause of the Sixth Amendment, extended to the States by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." *Pointer v. Texas,* 380 U.S. 400, 404 (1965). The Court has held that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross examine the witnesses against him." *Id.* at 406-407.

Petitioner was denied his rights under the Confrontation Clause because he could not cross-examine Ms. Cobb, a key witness against him. Special Agent Schmitz presented inadmissible hearsay testimony that Ms. Cobb had identified the petitioner as the person who disposed of a black camera bag which contained the fruits of the crime. Since Ms. Cobb did not testify, petitioner was precluded from cross-examining her.

Agent Schmitz' testimony about Ms. Cobb's out-of-court identification of petitioner was a crucial factor in petitioner's conviction. First, his testimony was the only evidence save that given by the admitted perpetrator (who owed the petitioner money) that petitioner participated in the robbery. Petitioner swore under oath that he was not involved with the robbery. Without Ms. Cobb's hearsay identification of the petitioner, the case would have rested upon the credibility of petitioner and Hill, a convicted

felon and an admitted cocaine addict. Second, Agent Schmitz' testimony clearly impressed the jury members who asked him two questions *directly related to the issue of identification.* Lastly, the impact of Special Agent Schmitz' testimony was reinforced by the jury's opportunity to examine the photograph on petitioner's driver's license.

The introduction of the inadmissible hearsay identification can not be attributed to petitioner even though petitioner's lawyer elicited Ms. Cobb's identification when cross-examining Agent Schmitz. Defense counsel relied on the prosecutor's assurance that Ms. Cobb would later testify as a witness for the government. Mindful of that assurance, the defense wished to lay the foundation for its claim that Ms. Cobb's out-of-court identification of petitioner was unreliable.

The trial judge's remedy, a limiting instruction, was insufficient to expunge the tainted evidence from the member's minds. This Court has discussed the question of whether jury instructions may effectively remove the poisoning effects of inadmissible hearsay evidence *vis-a-vis* the Confrontation Clause in *Bruton v. United States,* 391 U.S. 123 (1968). Quoting a note from *Jackson v. Denno,* 378 U.S. 368 (1963), this Court in *Bruton* stated:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors.

In *Bruton* the court received into evidence a co-defendant's confession which implicated the defendant. The co-defendant did not testify. The introduction of the co-defendant's confession added substantial weight to the Government's case in a form not subject to cross-examination. Accordingly, this Court concluded that Bur-

ton's Sixth Amendment rights had been violated and held that the encroachment on Bruton's right to cross examine the witnesses against him could not be avoided by a jury instruction to disregard the confession as to the defendant.

In the instant case, the presentation to the jury of the inadmissible hearsay identification of petitioner encroached on petitioner's constitutional right to cross examine Ms. Cobb, the true witness against him. Ms. Cobb's hearsay identification of petitioner, coupled with the publication to the jury of petitioner's photo on the driver's license, (a factor not present in *Bruton*), was at least as prejudicial to the petitioner as was the co-defendant's confession in *Bruton*. No instruction could have protected petitioner from its effects.

CONCLUSION

Petitioner respectfully requests petition for a writ of certiorari be granted to ensure that military and civilian courts properly comply with the Confrontation Clause of the Sixth Amendment.

APPENDIX A

IN THE UNITED STATES
COURT OF MILITARY APPEALS

U.S. Navy-Marine Corps Court of
Military Review NMCMR No. 84 2764

Docket No. 52097/NA

UNITED STATES, APPELLEE

v.

QUINCE L. EVANS, 334 54 5204
SEAMAN APPRENTICE (E-2), U.S. NAVY, APPELLANT

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS

Issues Presented

I

WHETHER THE MILITARY JUDGE ERRED TO THE MATERIAL PREJUDICE OF SUBSTANTIAL RIGHTS OF APPELLANT WHEN HE DENIED DEFENSE'S MOTION FOR MISTRIAL AFTER THE MEMBERS HEARD INADMISSIBLE EVIDENCE OF AN OUT-OF-COURT IDENTIFICATION OF APPELLANT?

Statement of the Case

Appellant was tried by general court-martial composed of officer members on 22, 23, 24, and 28 February and

1 March 1984 for violating Articles 85, 121, 122, 123, and 134, Uniform Code of Military Justice [hereinafter cited as UCMJ].[1] Pursuant to his pleas, appellant was found guilty of 1 specification of unauthorized absence, a larceny, 5 assaults, 2 robberies, and altering and uttering a check. Appellant was sentenced to be confined at hard labor for 30 months, to forfeit $450.00 pay per month for 30 months, to be reduced to pay grade E-1, and to be discharged from the service with a dishonorable discharge. The convening authority approved the sentence as adjudged. On 3 October 1984, the Navy-Marine Corps Court of Military Review affirmed without opinion.

Statement of Facts

The charges against appellant stemmed from an armed robbery that occurred at the Naval Regional Medical Center [NRMC] in Oakland, California.

In its opening remarks to the court members the Government summarized the evidence it intended to present with respect to the robbery offenses. Counsel informed them:

> And finally, you will also hear testimony that an individual by the name of Karen Cobb identified SA Evans as being at her brother's apartment – Preston Cobb's apartment – approximately two days after the robbery and that she saw him in a back alley outside of her apartment place a black bag with a long strap in some bushes and that the next day when the FBI contacted her she took them to the spot where the FBI Agent, John Schmitz, who will be here to testify, found a Bell and Howell black camera case with a

[1] 10 U.S.C. §§ 885, 921, 922, 923, 934 (1982).

long black strap and in it the valium, the cocaine, and the morphine taken from the hospital.

Record at 58.

The four victims testified as to the circumstances of the robbery, but could only identify the perpetrators as two black males about 5'11" and 5'7" in height. Record at 101-136. Two other witnesses placed appellant on or near the hospital grounds in the general time frame of the robbery, with another servicemember John Hill. Record at 143-164. John Hill, who had already been convicted for his perpetration of the robbery, and who had in fact already completed his sentence to confinement for 18 months, was the only witness to identify appellant as the other robber.

Also during its case-in-chief, the Government offered the testimony of John Schmitz, a special agent with the Federal Bureau of Investigation. Record at 137-142. Schmitz testified that he'd been called to an address in Oakland by a Mr. Cobb, whose daughter purportedly saw an individual hide something in the bushes. Ms. Cobb showed Schmitz where she'd seen the man standing and Schmitz retrieved a black Bell and Howell camera case from the bushes. Prosecution Exhibit 17. He identified items from the camera case. Prosecution Exhibits 15, 16, 19, 20. Exhibits 15 and 16 (valium and morphine) had been identified as fruits of the robbery by another witness. Record at 131. Finally he identified Prosecution Exhibit 21, appellant's photo driver's license that Schmitz had shown to Ms. Cobb. Schmitz testified that she had identified the person in the photo (appellant) as the one she saw hide the case in the bushes. The members posed two questions to the agent. Appellate Exhibits XV, XVI.

Prior to the Government's calling Agent Schmitz, after an objection by the defense, trial counsel assured the trial

judge in an Article 39(a), UCMJ,[2] session that Ms. Cobb would be testifying to her out-of-court identification of appellant. Record at 135. After the testimony, he again assured the trial judge of her expected appearance. Record at 142.

She was not called and did not testify. Following the closing of the Government's case, individual counsel moved for a mistrial, based on the improper evidence of the out-of-court identification. The trial judge denied the motion and instead instructed the members as follows:

> MJ: Okay, we have a preliminary item. If you recall, earlier in the trial there was testimony from an FBI agent named Schmitz. He gave testimony on an out-of-court identification of the accused by an individual named Karen Cobb, who basically identified the driver's license that was used for identification purposes. An identification by an individual like Karen Cobb outside of court needs to be testified to by Karen Cobb. That is hearsay if it's only testified to by somebody who happened to be present at the time. The testimony of Agent Schmitz was more or less, foundational. It was admitted into court only in anticipation that Karen Cobb would be called to actually give personal testimony about this identification. It develops that Karen Cobb is not going to be called, and this, in effect, makes Agent Schmitz's testimony *somewhat inadmissable,* retroactively. Of course, you've heard the testimony. So all I can do at this point is tell you that you should not have heard the testimony. Having done so, I am going to instruct you to disregard the testimony. It's not always an easy thing to disregard something you heard. However,

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[2] 10 U.S.C. § 839(a) (1982).

you can do it if you understand that in order for the accused to receive a fair trial, you simply must not consider any information testified to by Agent Schmitz. Let's proceed as though he did not give any testimony and do not utilize any of the information that he testified to. Do you have any questions about that?

PRES: No.

Record at 229 (emphasis added).

The trial judge also retrieved from the members Exhibit 21, the driver's license.

The individual counsel had already indicated his objection in that the prejudice from the improperly received evidence was too great to be cured by an instruction.

Argument

THE TRIAL JUDGE ERRED TO THE MATERIAL PREJUDICE OF SUBSTANTIAL RIGHTS OF APPELLANT WHEN HE DENIED DEFENSE'S MOTION FOR MISTRIAL AFTER THE MEMBERS HEARD INADMISSIBLE EVIDENCE OF AN OUT-OF-COURT IDENTIFICATION OF APPELLANT.

The testimony of agent Schmitz about Ms. Cobb's extrajudicial identification of appellant was unmistakably hearsay and inadmissible. It would have become an exception under Military Rules of Evidence 801(a)(1) only if she testified and were subject to cross-examination. Of course, she did not. The members heard about her purported identification of appellant only because of trial counsel's representations that she would testify.[3] They were

[3] Appellant does not allege misconduct on the part of governmental counsel with respect to getting Schmitz' testimony before the members. His opening remark, "[Y]ou will hear testimony *that* . . . Karen Cobb identified SA Evans . . . etc." implies that he knew she might not appear. His proffer to the military judge that she would

apparently impressed enough by the testimony regarding her identification to ask questions of the witness Schmitz.

Appellant contends that the military judge's half-hearted instructions to disregard the "somewhat inadmissible" testimony were insufficient under the circumstances to cure the prejudice to appellant's right to a fair trial. The ineffectiveness of the instructions was compounded by the members' having viewed real evidence in support of the testimony. The evidence was only relevant if linked to appellant. The record indicates that only the driver's license was retrieved from the members, and not the camera case and all its contents, inviting the members' attention to the poorly purged testimony that someone saw appellant hiding these fruits of the robbery in the bushes. This evidence was the only testimony save that of the admitted perpetrator that appellant participated in this robbery. Since appellant testified contrarily to Hill, without this ostensibly corroborating evidence, the case would have boiled down to a one-on-one situation.

Receipt of improper evidence can be the basis for a mistrial, under circumstances that cast substantial doubt on the fairness of the trial. *United States v. Jeanbaptiste,* 5 M.J. 374 (C.M.A. 1978). The test to determine whether a curative instruction is sufficient is whether the nature and importance of the evidence are such that would cause the members to disregard an instruction and weigh the evidence against the accused. *United States v. O'Neal,* 16 U.S.C.M.A. 33, 36 C.M.R. 189 (1966). A factor such as whether the evidence goes to a collateral or central issue is important. The members' responses that they are able to

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attend was unequivocal. He cannot be held blameless for the individual counsel's cross-examination of Schmitz, even if only due to carelessness.

disregard the evidence do not uniformly insure that they can do that. *United States v. Wilson,* 40 C.M.R. 716, 717 (A.B.R. 1969).

In a one-on-one situation, corroborative evidence of guilt is likely to weigh heavily in the court members' deliberations on the findings of fact. In such cases the risk that the members would not put it aside is too large to be tolerable. *United States v. Pastor,* 8 M.J. 820 (C.M.A. 1980).

Here we have the trial judge weakly instructing the court that the only corroborative evidence offered was "somewhat inadmissible retroactively," then leaving before them the very evidence that supposedly linked appellant to the robbery—the valium and morphine stolen from the hospital. The members' one-word response that they could disregard is not persuasive.

Appellant contends that considering all of the circumstances—the crucial nature of the evidence, the members' interest in it, the physical evidence left with them, and the weakness of the instruction—the mistrial was the only remedy adequate to insure him a fair trial. There is a fair risk that in weighing Hill's testimony against appellant's, the members considered purportedly purged corroboration. The bell, once rung, could hardly be unrung. While the trial counsel did not argue the purged testimony in closing argument, he had initially alerted the members to Karen Cobb's identification of appellant in his opening statement. Having been previously invited to listen for that evidence, they would be less likely to be able to disregard it totally. In addition, after all the evidence was in, the military judge instructed the court on the questionable value of accomplice testimony, and in so doing, reminded them again to consider corroborating evidence. We believe they did.

CONCLUSION

The Navy-Marine Corps Court of Military Review, by affirming without opinion, gives no guidance as to how to remedy evidentiary errors such as this. The more this Court tells the field about when mistrial is a viable remedy, the better for all. Policing the conduct of practitioners in military courts is the responsibility of this Honorable Court, as is maintaining the highest standards of fairness for military accuseds. We ask the Court to take this opportunity to sharpen the guidelines now available.

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CERTIFICATE OF FILING AND SERVICE

We certify that a copy of the foregoing was delivered to the Court and to Captain Winston J. Hughes, Director, Appellate Government Division, on 24 April 1985.

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APPENDIX B

IN THE UNITED STATES
COURT OF MILITARY APPEALS

U.S. Navy-Marine Corps Court of
Military Review NMCMR No. 84 2764

Docket No. 52097/NA

UNITED STATES, APPELLEE

v.

QUINCE L. EVANS, 334 54 5204
SEAMAN APPRENTICE (E-2)
U.S. NAVY, APPELLANT

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF MILITARY APPEALS**

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CERTIFICATE OF FILING AND SERVICE

We certify that a copy of the foregoing was delivered to the Court and to Captain Winston J. Hughes, Director, Appellate Government Division, on 24 April 1985.

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DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
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IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 84 2764

UNITED STATES

v.

QUINCE LEE EVANS, 334 54 5204
SEAMAN APPRENTICE (E-2)
U.S. NAVY

Decided: 3 October 1984
Sentence adjudged: 1 March 1984

Before: MATTHEW J. GORMLEY III, JOHN W. KERCHEVAL II, JOHN LECORNU

Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commanding Officer, Naval Station, Treasure Island, San Francisco, California 94130

CDR David C. Larson, JAGC, USN, Appellate Defense Counsel LT J. Cunyon Gordon, JAGC, USN, Appellate Defense Counsel CAPT Joseph M. Walker, JAGC, USNR-R, Appellate Government Counsel LT Brian D. Saunders, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error, and the Government's reply thereto, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence, as approved on review below, are affirmed.

/s/ MATTHEW J. GORMLEY III
MATTHEW J. GORMLEY III,
Senior Judge

(ABSENT)
JOHN W. KERCHEVAL II, Judge

/s/ JOHN LECORNU
JOHN LECORNU, Judge

UNITED STATES COURT OF MILITARY APPEALS

No. 52,097
NMCM No. 84 2764

UNITED STATES, APPELLEE

v.

QUINCE L. EVANS, SEAMAN APPRENTICE,
U.S. NAVY, APPELLANT

September 28, 1988

Counsel

For Appellant: *Lieutenant J. Cunyon Gordon,* JAGC, USN (on brief); *Commander David C. Larson,* JAGC, USN.

For Appellee: *Captain Carl H. Horst,* JACG, USN, Lieutenant J.K. Ianno, JAGC, USNR, *Lieutenant Brian S. Saunders,* JAGC, USNR (on brief); *Captain W. J. Hughes,* JAGC, USN.

Military Judge: Philip F. Roberts

Opinion of the Court

EVERETT, Chief Judge:

Contrary to his pleas, Evans was convicted by a general court-martial composed of officer members of unauthorized absence, larceny, two robberies, forgery of a Treasury check, five assaults with intent to rob, and communication of a threat, in violation of Articles 86, 121,

122, 123, and 134, Uniform Code of Military Justice, 10 USC §§ 886, 921, 922, 923, and 924, respectively. The sentence adjudged by the members was a dishonorable discharge, confinement for 30 months, forfeiture of $450.00 pay per month for 30 months, and reduction to pay grade E-1. The convening authority approved these results, and the Court of Military Review affirmed in a short-form opinion. We granted appellant's petition for review to consider:

> WHETHER THE MILITARY JUDGE ERRED TO THE MATERIAL PREJUDICE OF SUBSTANTIAL RIGHTS OF APPELLANT WHEN HE DENIED DEFENSE'S MOTION FOR MISTRIAL AFTER THE MEMBERS HEARD INADMISSIBLE EVIDENCE OF AN OUT-OF-COURT IDENTIFICATION OF APPELLANT.

I

The robbery and assault charges against Evans involved an armed robbery at the Naval Regional Medical Center in Oakland, California, during which two masked men took cash and drugs. In summarizing the Government's evidence during his opening statement to the court members, trial counsel informed them that various witnesses would testify to the circumstances of the robbery; that other witnesses would place appellant with one John Hill shortly before and soon after the robbery; and that Hill would testify that he and appellant perpetrated the armed robbery. Trial counsel prepared the court members to hear

> certain things that are . . . not too good about Mr. Hill. Now, he will tell you that he is a convicted felon and that for these robbery charges and these assault charges he went to a general court-martial in April of

1982 and was convicted. He will also tell you that he agreed to testify against SA Evans as a result of a pretrial agreement, in that he would receive lesser punishment than could be awarded or that the punishment would be limited to 18 months' confinement at hard labor instead of whatever the judge or the jury would have awarded him and that his testimony against SA Evans, initially in an Article 32 Investigation, was done so—was prompted by the promises made that he would receive a reduced sentence.

Then you will also hear that HM Hill was a cocaine addict. The reason that he planned the robbery of the hospital was that he was out of money, had no money to buy cocaine, and that he felt that since the hospital did use cocaine in their ear, nose, and throat treatments that he could obtain that and continue getting his high.

Later in his opening statement trial counsel asserted:

And finally, you will also hear testimony that an individual by the name of Karen Cobb identified SA Evans as being at her brother's apartment—Preston Cobb's apartment—approximately two days after the robbery and that she saw him in a back alley outside of her apartment place a black bag with a long strap in some bushes and that the next day when the FBI contacted her she took them to the spot where the FBI Agent, John Schmitz, who will be here to testify, found a Bell and Howell black camera case with a long black strap and in it the valium, the cocaine, and the morphine taken from the hospital.

During the Government's case-in-chief, four victims of the robbery described the circumstances; but they could only identify the perpetrators as two black males around

5'11" and 5'7" in height. Thereafter, trial counsel announced that he intended to call, as a witness, Special Agent John Schmitz of the FBI. At this point, appellant's civilian counsel asked for an Article 39(a), UCMJ, 10 USC § 839(a), session and then explained to the military judge that it was his

> understanding that Karen Cobb was going to testify as to the identification of the accused a couple of days after the alleged robbery. And after talking with LT Downing [trial counsel] just now, it's my understanding that Agent Schmitz may testify that he showed a picture of the accused to Karen Cobb . . . who allegedly will testify that she saw the accused a couple days subsequent to the alleged robbery throw the black camera case, which had been taken from LCDR Marine [one of the victims], into the bushes and it was subsequently retrieved by the FBI.

Civilian defense counsel expressed concern that exhibiting the picture to Ms. Cobb when she made the identification had been "unnecessarily suggestive," so that her identification might itself be subject to suppression under Mil.R.Evid. 321(d)(2). This colloquy ensued:

TC: The only thing that the agent will testify to is where he found these items, first of all.

IC: We have no objection to that.

TC: And secondly, he will simply identify what he showed Karen Cobb . . . it's simply a copy of a driver's license. So, all he will do is identify the exhibit as being that prepared by him to show to Karen Cobb. He is not going to testify as to what Karen Cobb said. *Karen Cobb* will be here in *person to do* that.

MJ: Well, what was the sequence of her identification of the accused—how was it she came to

say that this accused was the individual she saw throwing the bag away? Was it after the agent showed this to her and said, "Is this the fellow you saw?"

IC: Yes, sir.

MJ: And you're saying that this should be excluded because it –

IC: Unnecessarily suggestive out-of-court ID.

After further discussion, the judge ruled that

> based on the requirement of the agent for the witness to provide a description and the witness' stated belief that she would be able to identify the individual the court does not find that the showing of a single photograph is unnecessarily suggestive. If, however, you wish to explore with the witness' cross-examination as a matter of weight the validity of the identification then you are at liberty to do so.

Mr. Schmitz then testified that, as a result of an anonymous call, he had interviewed Karen Cobb, who lived in an apartment on Trask Street in Oakland, California. She told him that she had observed someone "take . . . a package of some kind, and put it in some bushes along Trask Street." Schmitz then identified a "camera case which" he had "found in the bushes next to the apartment where Karen Cobb pointed." Schmitz next identified "a copy of a California driver's license for a Quince Lee Evans," which he had shown to Karen Cobb during the interview. His purpose was "[t]o determine if she could identify this individual as being the individual that she observed putting the item that she said she saw into the bushes."

On cross-examination, Schmitz conceded that, according to Ms. Cobb, she had had a very limited opportunity to observe the person who had thrown the package into

the bushes. The final questions and answers during cross-examination were these:

Q. And you showed her the picture of the accused and asked her if this was the person who was there, isn't that right?
A: Yes.
Q. And after you showed her the picture she said, "Yes, it is," isn't that correct?"
A. Yes.
Q. She did not volunteer his name, isn't that right?
A. No.

There was no redirect.

The next two witnesses testified that Evans and another serviceman, John Hill, had been near the Medical Center at about 11:30 p.m.—shortly before the robbery. In turn, Hill, who had already been convicted for the robbery and had served his sentence to confinement of 18 months, identified appellant as his accomplice. During cross-examination, Hill admitted that, although he had been urged to name appellant as the other robber, he originally intended to identify someone else. However, in order to obtain a favorable pretrial agreement, he finally had stated that Evans was the other robber. Hill insisted, however, that his identification of appellant as his accomplice was accurate.

Ultimately, the Government rested its case-in-chief without calling Karen Cobb to the stand, whereupon the defense counsel stated:

> [O]ne of the witnesses called by the Government, Agent Schmitz, of the FBI, testified that Evans was identified by a woman by the name of Karen Cobb as throwing the evidence that was introduced into some bushes. Upon questioning by the military judge, the trial counsel told the military judge that Karen Cobb

would be called also. We had moved at that time to suppress the out of court identification as unnecessarily suggested—suggest and it was denied by the military judge—that was denied by the military judge after representation by the trial counsel that Ms. Cobb would be called. Your Honor, it's our position that the testimony of Agent Schmitz is not admissible without Miss Cobb as hearsay under, I think, it's 801(d)1c. and 321, when the only time a witness can testify to the out of court identification of another witness is when the other witness is present in court for the purposes of cross-examination, and since the Government is resting, it is obvious that Ms. Cobb will not be called.

After trial counsel confirmed that he did not plan to call Miss Cobb, the defense moved for a mistrial; and the motion led to this colloquy:

MJ: Oh, well, realistically what would you like to have? Failing in that, what would you like to—

ICC: If that fails—

MJ: An instruction, perhaps, of some sort—

ICC: Well, I'd like the testimony of Agent Schmitz stricken.

MJ: Well, I'm not even sure what the Government's position is on this. What's the Government's position on his motion for a mistrial?

TC: The Government opposes that.

In turn, trial counsel pointed out that

> [t]he testimony from Mr. Schmitz was that he asked Karen Cobb whether she could identify the individual she saw, and that he showed her a picture which was admitted into evidence, and that he identified the pic-

ture as that being the one he showed her at that time. At that point the Government ceased direct examination and didn't elicit anything further with the full attention [sic] that Karen Cobb would be here. However, on cross-examination the last question the defense counsel asked was, "Well, and she identified the picture, isn't that right"?, and Mr. Smith [sic] said, "Yes." So, the Government did not elicit any evidence from Mr. Schmitz on the identity of the individual in the picture. However, the defense counsel did through his own cross-examination, and he cannot now be—stand here and cry, foul, when through his own questioning he elicited the response which he now seeks to suppress as hearsay. So that's the Government's position is that the in court—or the statement of Mr. Schmitz should stand, given the fact that the individual who asked the question, was, in fact, the defense.

Had the Government asked the question, and the defense objected, on the grounds of hearsay, then not only would the military judge have instructed the members to disregard, but then the Government would have again, brought Miss Cobb in and had her testify as to the identity. So, the Government's position on it is that whatever—even though it may have been hearsay at the time, it was . . . not objected to by Government counsel and the question was asked by the defense and now they ask to strike the whole testimony.

Civilian defense counsel replied that he had

bas[ed] the questioning on the representation of the trial counsel who is an officer of the court, that Miss Cobb would be called. He said that in response to the questioning of the military judge and . . . [y]ou asked

> if Miss Cobb would be called. You said you assumed she would be called and the trial counsel said, yes. It's my understanding that what happened is that trial counsel intended to call Miss Cobb but she didn't show up.

Trial counsel in turn confirmed that Miss Cobb was not going to be produced, because "[i]t simply was determined that after that evidence came in through defense counsel, there was no need to call Miss Cobb."

The military judge then ruled that, because the questions by the defense had been asked in the belief that Miss Cobb would be called by the Government and "the special agent's testimony was, basically, foundational, and for the purpose of establishing the identity of the driver's license shown to Miss Cobb," the testimony by Schmitz about the identification should be stricken as hearsay. The judge asked trial counsel, "Do you want to try to get Miss Cobb to the trial today?" After receiving an affirmative answer, the judge denied the motion for mistrial.

After being allowed to address further his motion for mistrial, civilian defense counsel pointed to certain weaknesses in the Government's case and contended that, under the circumstances, "the testimony of the FBI agent is devastating to the defense case and is so prejudicial that it outweighs any probative value and cannot be cured by mere striking of the testimony and the retrieving of the driver's license." The judge then stated his opinion, "based on all the evidence presented in the case so far and the nature of this matter, that"—along with striking from evidence the driver's license which had been previously admitted—"an instruction to the members would be sufficient to cure any prejudice to the accused."

Following a brief recess to allow further opportunity for the Government to contact Miss Cobb, trial counsel an

nounced that he would not call her. Soon thereafter—before the defense opened its case—the military judge instructed the members in this manner:

> Okay, we have a preliminary item. If you recall, earlier in the trial there was testimony from an FBI agent named Schmitz. He gave testimony on an out-of-court identification of the accused by an individual named Karen Cobb, who basically identified the driver's license that was used for identification purposes. An identification by an individual like Karen Cobb outside of court needs to be testified to by Karen Cobb. That is hearsay if it's only testified to by somebody who happened to be present at the time. The testimony of Agent Schmitz was more or less, foundational. It was admitted into court only in anticipation that Karen Cobb would be called to actually give personal testimony about this identification. It develops that Karen Cobb is not going to be called, and this, in effect, makes Agent Schmitz's testimony somewhat inadmissible, retroactively. Of course, you've heard the testimony. So all I can do at this point is tell you that you should not have heard the testimony. Having done so, I am going to instruct you to disregard the testimony. It's not always an easy thing to disregard something you heard. However, you can do it if you understand that in order for the accused to receive a fair trial, you simply must not consider any information testified to by Agent Schmitz. Let's proceed as though he did not give any testimony and do not utilize any of the information that he testified to. Do you have any questions about that?

The president of the court-martial answered in the negative; and trial continued on to findings and sentence.

II

The testimony by FBI Agent Schmitz about Miss Cobb's identification of appellant clearly was hearsay and would have been inadmissible if offered by the Government. In light of the context in which defense counsel asked Schmitz about this identification during cross-examination, we fully agree with the defense argument and the military judge's ruling that the hearsay objection had not been waived and that Schmitz' testimony in this regard should be stricken.

Having determined to strike the hearsay testimony which identified Evans as one of the two robbers, the judge could properly have granted the defense motion for a mistrial. *See* para. 56*e*(1), Manual for Courts-Martial, United States, 1969 (Revised edition). In his opening statement, trial counsel had summarized the testimony that he said Miss Cobb would be giving; but then he had decided not to call her. The court members had heard the stricken testimony of Agent Schmitz. The principal evidence linking Evans to the crime was the testimony of Hill—a purported accomplice of poor credibility who was testifying in order to obtain the benefit of a pretrial agreement in his own case. Therefore, the military judge could permissibly have concluded that the references to Miss Cobb in the opening statement and in the stricken testimony might have prejudiced appellant and that the fairest course of action would be to grant a mistrial. Another alternative might have been to deny the motion for mistrial conditionally and require the Government to reopen its case and call Miss Cobb as a witness.

Instead, the judge decided to rely on giving a curative instruction. In many instances, a judge can avoid the necessity for a mistrial by suitable instructions and by assuring that the court members fully understand them.

See, e.g., United States v. Watkins, 21 M.J. 224 (C.M.A.), *cert. denied,* 476 U.S. 1108 (1986);[1] *United States v. Seymore,* 19 M.J. 608 (A.C.M.R. 1984); *United States v. Gann,* 732 F.2d 714, 725 (9th Cir. 1984); *United States v. Steele,* 727 F.2d 580 (6th Cir.), *cert. denied,* 467 U.S. 1209 (1984); *United States v. Slocum,* 708 F.2d 587, 598 (11th Cir. 1983); *United States v. Escalante,* 637 F.2d 1197, 1202-03 (9th Cir.), *cert. denied,* 449 U.S. 856 (1980). Indeed, if such a remedy is adequate, it is a "preferred" method for curing the error when court members have heard inadmissible evidence, since the declaration of a mistrial is a rather drastic remedy. *United States v. Escalante, supra; United States v. Jeanbaptiste,* 5 M.J. 374 (C.M.A. 1978); *United States v. Simonds,* 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966). Thus, the issue is whether the curative instruction avoided prejudice to appellant or whether, instead, the failure to declare a mistrial was an abuse of discretion by the judge. *Cf. Burtt v. Schick,* 23 M.J. 140 (C.M.A. 1986).

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[1] In *United States v. Watkins,* 21 M.J. 224, 226 (C.M.A.), *cert. denied,* 476 U.S. 1108 (1986), we affirmed the following limiting instruction:

> Let me tell you that yesterday I allowed the examination of Staff Sergeant Watkins by the trial counsel concerning questions about other acts involving violence and intoxication and correlation. Now, you will recall that the accused denied those acts. So that there is no evidence that such acts occurred. You may draw no inference that the acts occurred or did not occur, and you may draw no inference that they did occur by my allowing the questions to be put to him. You may, additionally, draw no inference that he must have been involved or they would not have been asked . . . or anything like that. All right. They were merely allowed to be put to him in an effort for the prosecution to show a plan or a design going to this kind of relationship between alcohol and violence. Any questions about that?
>
> Negative responses.

The curative effect of jury instructions has been discussed from time to time by the Supreme Court. In *Leyra* v. *Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), the Court held that a New York procedure for determining the voluntariness of a defendant's confession was unconstitutional because, among other things, it relied too heavily on the jurors' ability to follow the trial judge's instructions that they should disregard the defendant's confession if they determined that it was involuntary. Similarly, in *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court concluded that receipt in evidence of a codefendant's confession—*albeit* with limiting instructions—violated the confrontation clause, because too *great* a likelihood existed that the jurors would consider the confession against the defendant.

Recently, in *Cruz v. New York,* 481 U.S. ____, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), the Supreme Court reaffirmed the position taken in *Bruton.* Rejecting a view stated by the plurality opinion of four Justices in *Parker v. Randolph,* 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), the Court refused to recognize any exception to *Bruton* where the confession of a defendant "interlocked" with that of a codefendant. Justice Scalia's majority opinion in *Cruz* finds its rationale in this quotation from *Bruton*:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a condefendant, who stands accused side-by-side with the defendant, are

deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect.

107 S.Ct. at 1717.[2]

Thus, it seems clear that in some situations an instruction to the jurors—or even to the members of a court-martial—cannot cure the harm that has been caused by erroneous admission of evidence. On the other hand, in *Tennessee v. Street,* 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985), the Supreme Court unanimously upheld a conviction despite a claim that the defendant had been prejudiced by admission of an accomplice's written confession under limiting instructions. In this instance, the confession had been offered in rebuttal after the defendant had testified that his own confession had been coerced from him on the basis of an accomplice's confession. A prosecution witness then testified that the defendant had not been read the accomplice's confession; and this witness was allowed to read that confession to the jury after the trial judge had advised the jurors that it was not admitted to prove its truthfulness but only for the purpose of rebutting the defendant's claim as to the circumstances of his own confession. In this instance, the Supreme Court was willing to "rely on the 'crucial assumption' that the jurors followed 'the instructions given them by the trial judge.' " 471 U.S. at 415.

Of course, in *Street* the Court also emphasized that the necessity for introducing the out-of-court confession had been created by defendant's own testimony about the circumstances of his own confession; and "there were no

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[2] Of course, in some instances—as recognized in *Cruz v. New York,* 481 U.S. ____, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987)—the coaccused's confession will itself be admissible as substantive evidence.

alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence." 471 U.S. at 415 (footnote omitted). Obviously—as *Cruz* later has confirmed—the Supreme Court in *Street* was not relying on curative instructions as an invariable means of correcting error and avoiding the necessity for a mistrial.

With these precedents in mind, we approach the facts of this case. In the first place, the military judge gave a cautionary instruction which not only advised the members that they should not consider the testimony which he had stricken but also explained why they should not consider it. From our reading of his explanation, we believe that it would have been very understandable to the members of the court-martial—All of whom were officers—and that they would have conscientiously attempted to comply with their sworn duty to follow the judge's instruction.

Admittedly, at one point in his instructions, the judge stated that Karen Cobb's absence had made "Agent Schmitz' testimony somewhat inadmissible, retroactively." Indeed, he should have stated that the testimony was "inadmissible" without any qualification, for "somewhat inadmissible" is an oxymoron, like "a little pregnant." However, the last part of his instruction—"you simply must not consider any information testified to by Agent Schmitz"—certainly makes its point.

The military judge properly asked whether the court members had "any questions about that." In *United States v. Steele, supra,* where erroneous admission of evidence of the defendant's incarceration was held to have been cured by the judge's instruction, the judge had asked the jurors whether they could disabuse their minds of a prejudicial remark and not consider it as to the guilt or innocence of the accused; had required that each juror who could disregard the remark raise his hand; and then had ob-

served for the record that the hands of all the jurors were raised. Likewise, in *United States v. Slocum, supra,* where the prosecutor impermissibly had asked a witness about other misconduct of the defendant, the judge had inquired of each juror, "[Do] you feel you can follow the court's instructions and disregard [the question and answer] completely and have no bearing, whatsoever, as far as weighing the testimony as against these defendants?" 708 F.2d at 597-98 and n. 11. An affirmative answer had been obtained from the individual jurors.

We would have preferred here the military judge had inquired specifically of each court member whether he could "disregard" the testimony of Agent Schmitz and had obtained an affirmative response to that question. However, even though the question was addressed generally to the members and there was no separate response, we believe that the judge's inquiry enhanced the beneficial effect of the curative instruction.

In *Street,* the instruction to the jurors was given to limit their consideration of evidence which was admissible only for a specific purpose. Here, the instruction was necessitated by reception of inadmissible evidence, which had come in as a result of a tactical misjudgment by the prosecutor in not calling Ms. Cobb. Moreover, unlike *Street,* the defendant had not in any way induced the situation which created the need for the curative instruction.

However, here we discern no prosecutorial misconduct, like that in *United States v. Carroll,* 678 F.2d 1208 (4th Cir. 1982), where the Court held that the prosecutor's improper argument alluding to evidence not before the court and objectionable under Fed.R.Evid. 404(a) was reversible error despite a limiting instruction. Certainly, if we perceived that trial counsel in this case had never from the outset intended to call Miss Cobb as a witness, we would be more inclined to find prejudice.

According to one court, "Proper instructions will usually suffice to correct damage from any erroneously admitted evidence or evidence admissible only for a limited purpose." *See Cramer v. Fahner,* 683 F.2d 1376, 1384 (7th Cir.), *cert. denied,* 459 U.S. 1016 (1982). We do not know that we would go so far in assessing prejudice. However, it seems clear to us that the testimony of Agent Schmitz and trial counsel's reference in his opening statement to the expected testimony of Karen Cobb would have had much less impact on the court members than would an extrajudicial confession by an accomplice – like that involved in *Bruton* and *Cruz.* Indeed, they probably would have had less impact than improperly admitted evidence of uncharged misconduct – which often has been cured by jury instructions. *Cf. United States v. Steele* and *United States v. Slocum,* both *supra.* With these circumstances in mind, we conclude that here the military judge's curative instructions and inquiry of the members provided an adequate remedy.

III

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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